JURISDICTION

Respondent accepts petitioner's statement of the jurisdiction of this court.

QUESTION PRESENTED

Whether the Supreme Court of Oregon deprived petitioner of his rights under the Constitution of the United States when it dismissed his appeal for default in filing his brief and refused to allow a motion for relief from default.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent accepts petitioner's statement of the Constitutional provisions involved.

STATEMENT OF THE CASE

Petitioner's statement of the case is inaccurate and incomplete in several respects.

In the first place, the following appears in Appendix L of the petition: "* * * In that connection, it is our understanding that the defendant has disappeared and his whereabouts are unknown. If he has now been located and has retained you, please so advise. * * *" It does not appear that Mr. Sandblast, who purported to represent petitioner, made response to the court's direction. However, the record filed pursuant to the requirement of Rule 21 (1) refers to " 'Exhibit A', power of

attorney, executed by Isaiah H. Hammons, appellant, appointing L. B. Sandblast." This power of attorney was executed in connection with the petitioner's application for appeal bail bond. Subsequent to the execution of this alleged power of attorney the trial court appointed Mr. Nathan Ail to represent the petitioner on his appeal to the Supreme Court of Oregon on the application of the petitioner. Therefore, it would appear that Mr. Sandblast was never authorized to represent the petitioner and, perforce, the attorneys who prepared the petition are not authorized to represent the petitioner.

The full record discloses that Mr. Ail moved in the Supreme Court on January 25, 1965, for permission to withdraw as attorney and simultaneously moved for an extension of time in which the appellant's brief could be filed, in order that petitioner could secure other counsel. Appendix F of the petition is not a copy of the motion filed with the Supreme Court of Oregon, but is a copy of the motion filed in the trial court pursuant to the Supreme Court Clerk's letter of January 27, 1965, notifying Mr. Ail that he had made application to the wrong court. In fact, Mr. Ail's motion in the Supreme Court was allowed only to the extent of extending the time in which to file appellant's brief to March 1, 1965. Subsequently, Mr. Ail made application to the trial court for permission to withdraw as attorney and the order allowing him to withdraw was entered by the trial court on February 15, 1965. It is to be noted that Appendix I is an order by the trial judge, not by the Supreme Court. Therefore, it appears from the record that at the time the Supreme Court of Oregon extended the due date for

appellant's brief to March 1st, Mr. Ail was still attorney of record for petitioner and remained so until February 15, 1965, when he was permitted to withdraw by the trial court. Whether or not Mr. Ail notified his client of his withdrawal from the case does not appear in the record.

The petition, on page 3 thereof, acknowledges that Mr. Ail was appointed by the circuit court to represent the petitioner as an indigent appellant. In the absence of anything to the contrary in the record, it must be assumed that Mr. Ail performed his professional responsibility and made effort to notify the petitioner of his withdrawal from the case. ORS 138.500 reads in part as follows:

> "(1) If a defendant in a criminal action * * * wishes to appeal from an appealable adverse final order or judgment of a circuit court and if such person is without funds to employ counsel for the appeal, he may request the circuit court from which the appeal is or would be taken to appoint counsel to represent him on such appeal. The request shall be in writing and shall be made within the time during which an appeal may be taken or, if the notice of appeal has been filed, at any time thereafter. The request shall include a brief statement of the assets, liabilities and income in the previous year of such person. Upon receiving such a request, the circuit court, if it finds that petitioner or defendant is without funds to employ counsel for an appeal, shall appoint counsel to represent petitioner or defendant on the appeal. * * *"

Thus Mr. Hammons had once proceeded to have coun-

sel appointed for him and the same procedure was open to him after the withdrawal of Mr. Ail. While it is by no means clear, and respondent does not concede, that it was the responsibility of the circuit court to appoint other counsel after Mr. Ail's resignation, it is perfectly clear in the circumstances that it was not the fault of the Oregon Supreme Court that petitioner was without counsel after February 15, 1965. It should be noted that February 15, 1965, was after the original due date for appellant's brief. The extension to March 1, 1965, by the Oregon Supreme Court is a clear indication that petitioner's rights were protected at all times insofar as the Oregon Supreme Court had any responsibility at all.

On page 7 of the petition appears the statement that "* * * said attorney had already filed his statement of what errors the lower court had made at the trial." On page 9 of the petition it is said: "The fact that Mr. Ail was able to prepare a list of errors which the lower court had committed is certainly evidence enough to indicate that he did not consider the filing of the appeal to be frivilous and not in good faith." The fact is that no such "statement" or "list" appears in the record of this case nor was any such ever prepared.

On page 10 of the petition it is stated: "The record further discloses that the notice of dismissal of appeal of March 16, 1965, from the Clerk of the Supreme Court was sent only to Mr. Ail, who had previously withdrawn from the case and therefore had no further connection or interest therein, and to the state's attorney." Petitioner insists on referring to the notice of March 16,

1965, as a "notice of dismissal of appeal." It was in fact a notice of default and on its face shows that it was a notice that the appeal "will be dismissed for want of prosecution, pursuant to Rule 33, unless good cause be shown within 30 days from this date why the appeal should be retained on the docket." Attached to said notice and forming a part thereof is a certificate by the Clerk of the Supreme Court that notice was sent to Mr. Ail, the district attorney and to petitioner at the Oregon State Penitentiary, which, according to the records available to the Supreme Court, was petitioner's only known address. Further, the record contains a copy of a letter from Mr. Ail addressed to the petitioner at petitioner's last known address in Portland, Oregon, which letter was dated March 17, 1965, a date well within the 30 days expressed in the notice of March 16, 1965. It should be noted that at that time Mr. Ail was still acting to protect petitioner's interests. Further, it must be noted that respondent's motion to dismiss appeal was not filed until May 17, 1965, more than two months after the notice of default and after the time when Mr. Sandblast purportedly began to represent petitioner, as shown by Appendix K of the petition.

REASONS AGAINST GRANTING THE WRIT

I. Petitioner Was Not Discriminated Against.

Due to petitioner's inaccurate, incomplete and misleading statement of the case, it has been necessary for respondent in restating the case to present some matters argumentatively. Respondent's statement of the case

should therefore be taken to be a part of its reasons against granting the writ. A proper reading of the record shows plainly that this indigent petitioner had the assistance of counsel on appeal. He was in no way discriminated against.

Petitioner cites *Powell et al. v. State of Alabama,* 287 U.S. 45, with an implicit suggestion that the Oregon courts failed to provide petitioner with the assistance of counsel during a critical stage of the proceedings. The record, filed by petitioner, defeats this suggestion, for Mr. Ail was appointed to represent petitioner, counsel was allowed to correct an omission to comply with the appellate procedure and more than the ordinary time was allowed for the filing of the brief. As this court said in *Douglas* v. *California,* 372 U.S. 353, at 356:

> "* * * A State can, consistently with the Fourteenth Amendment, provide for differences [in the manner of handling appeals by indigents] so long as the result does not amount to a denial of due process or an 'invidious discrimination.' * * *"

Nothing in this record shows that petitioner was discriminated against in any way. On the contrary he had every protection he was entitled to.

Petitioner cites *Speers* v. *Gladden,* 237 Or. 100, 390 P.2d 635. This case is relevant on the issues presented by petitioner, for it presents a review of Oregon's method of handling indigent's appeals and shows that the method not only complies with the requirements of *Douglas,* but goes beyond. In the instant case, as in the *Speers* case, appointed counsel sought to resign for the reason that

counsel could find "no prejudicial error of record and there therefore is no substantial question to be raised by an appeal." Precisely the same factual situation is presented here. The transcript was prepared and settled. Mr. Ail, an attorney of undoubted competence, reviewed the transcript and concluded that there was no error of record upon which to base an appeal. The court in *Speers* cited *Ellis* v. *United States,* 356 U.S. 674, which involved an appeal in the federal court system. In that case this court said that if counsel seeks to withdraw and the court is satisfied that counsel has investigated the appeal thoroughly and if the court agrees with the counsel's evaluation, then the withdrawal may be allowed and *leave to appeal may be denied.*

Oregon's system is more solicitous of the defendant's interests for the reason that withdrawal of counsel has no effect upon the appeal. The indigent defendant (who has already had the benefit of counsel) may proceed on his own and the court must examine the record for assigned error and for errors not assigned. The thrust of petitioner's argument is that the court is obligated to appoint counsel for the defendant who will present the appeal regardless of its merit. *Douglas* does not demand such a result.

II. Every Reasonable Effort Was Made To Give Petitioner Notice.

The record also shows that petitioner's former counsel, the Supreme Court and the district attorney made every reasonable effort to notify the petitioner of pending dismissal of his appeal. The only reason petitioner

did not get due and proper notice of the pending dismissal was that he had fled the jurisdiction and his whereabouts were (and are) unknown. It is to be noted that Mr. Sandblast, who purported to represent the petitioner, never presented any reasons supported by the record for relief from default. In the circumstances it cannot fairly be said that the court's action in refusing to relieve petitioner of the order of default was an abuse of its discretion, arbitrary or capricious. There was no violation of the petitioner's constitutional rights.

CONCLUSION

For the reasons stated above respondent submits that a writ of certiorari should not issue to review the decision of the court below.

Respectfully submitted,

GEORGE VAN HOOMISSEN
District Attorney for
Multnomah County, Oregon
GEORGE M. JOSEPH
Deputy District Attorney
600 County Courthouse,
Portland, Oregon 97204
Counsel for Respondent

September 20, 1965.